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Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

H&R BLOCK, INC.; H&R BLOCK TAX SERVICES, INC.;
H&R BLOCK EASTERN TAX SERVICES, INC.;
ROBERT HECKERT; CYNTHIA LANTZ; CLARENCE E. MILLER;
CARLA R. LEWIS; DEBRA RIGGLEMAN; AND JOHN DOE,
Petitioners,

v.

DEADRA R. CUMMINS; IVAN BELL; AND LADONNA BELL,
ON THEIR OWN BEHALF AND ON BEHALF OF
THOSE SIMILARLY SITUATED,
Respondents.

Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the fact that an arbitration provision prohibits a party from pursuing a class action provides a valid legal basis, consistent with the Federal Arbitration Act (FAA), for holding the arbitration provision unconscionable and refusing to enforce the agreement to arbitrate?

2. Whether, under the FAA, when an arbitration provision in a contract specifies that the validity and enforceability of the provision is to be decided by the arbitrator, a court still retains the power to decide that the agreement to arbitrate is substantively unconscionable as applied to a particular dispute?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In addition to the petitioners and respondents listed below, the parties in the litigation below include Block Financial Corporation and H&R Block Services, Inc., both of which were added by respondents in a second amended complaint filed subsequent to the decision under review. Respondents have also named, but never served, three individual defendants, Melanie Lester, Jason Brown, and Bobby Hague.

Petitioner H&R Block, Inc., is a publicly held company traded on the New York Stock Exchange. Each of the other corporate petitioners is a direct or indirect subsidiary of H&R Block, Inc. No publicly held company owns 10% or more of the stock of H&R Block, Inc., and no publicly held company other than H&R Block, Inc. owns 10% or more of any of the other petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners H&R Block, Inc. *et al.*, respectfully request that the Court grant a writ of certiorari to review the judgment of the Circuit Court of Kanawha County, West Virginia.

OPINION BELOW

The order of the Circuit Court of Kanawha County, West Virginia, declining to compel arbitration, is unreported and is reprinted at Pet. App. 3a-15a. The order of the Supreme Court of Appeals of West Virginia denying Petitioners' Petition for Writ of Prohibition is reprinted at Pet. App. 1a-2a.

JURISDICTION

The order of the Circuit Court of Kanawha County, West Virginia denying the Petitioners' motion to compel arbitration was filed June 1, 2004. Petitioners' timely Petition for Writ of Prohibition was denied by the West Virginia Supreme Court of Appeals on September 2, 2004. This petition was filed within 90 days of September 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) An interlocutory ruling of a state court refusing to enforce an arbitration clause, once appealed as far as possible within the state court system, is "final" for purposes of section 1257(a). *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984).

STATUTE INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,

> or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Petitioners – H&R Block, Inc., several of its affiliate companies, and six of its current or former employee tax preparers – seek review of an order of the Circuit Court of Kanawha County, West Virginia refusing to enforce an arbitration agreement. The Supreme Court of Appeals of West Virginia declined to issue a writ of prohibition to review the trial court's ruling. The trial court's decision reflects an outright antagonism toward arbitration that has recently emerged in West Virginia state law, in disregard of section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2. Two key facets of that antagonism are (1) the rule, established by the Supreme Court of Appeals, that an arbitration clause is unconscionable if it does not preserve the right to litigate claims on a class basis, *see State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002), and (2) the tendency, illustrated by the Circuit Court in this case, to decide issues of enforceability in the face of an explicit arbitration provision reserving questions of "enforceability" for the arbitrator.

The West Virginia court's ruling on class actions is on one side of a massive split that has developed across jurisdictions about whether an arbitration agreement is unconscionable if it waives the procedural option of litigating claims as a class action. By holding that such waivers of class litigation are unconscionable, West Virginia courts have

invited plaintiffs in consumer litigation to annul otherwise-valid arbitration agreements in their entirety, simply by styling their claims as class actions. And the very nature of class actions means that defendants doing business around the country may be exposed to nationwide class actions, including customers from jurisdictions that respect such arbitration clauses, as long as at least one jurisdiction chooses to disregard the applicable arbitration provision and allow classwide claims to proceed. Plaintiffs, in turn, will seek out such accommodating jurisdictions in which to file their class actions. This situation is untenable given the uniform pro-arbitration goals of the FAA. And there is no indication that it will disappear on its own.

In addition, the Court is presented in this case with a simpler yet no less important question: whether a court may disregard the parties' express agreement to arbitrate "enforceability" of an arbitration provision and resolve questions of enforceability, including claims of unconscionability, itself. This too is a matter warranting clarification by this Court.

1. Petitioners provide income tax preparation services for individual taxpayers. Their customers who choose to file their returns electronically and who are due tax refunds become eligible to be offered Refund Anticipation Loans ("RALs") from a third-party lender (the "bank"). RALs are short-term loans secured by, and payable from, the tax refund that customers expect to receive from the Internal Revenue Service. The bank is the actual lender on the loans.

Respondents are individuals who obtained RALs from the bank through offices of petitioners over the last decade. Respondent Cummins obtained her RALs in a number of different years including 1999 through 2002. Respondents Ivan and LaDonna Bell jointly obtained their RALs from 1997 through 2002. On July 29, 2003, they filed a First

Amended Complaint, on behalf of themselves and a putative class of West Virginia customers who obtained RALs in previous years, alleging breach of fiduciary duty, breach of contract, unjust enrichment, unfair or deceptive acts or practices, and violation of West Virginia's statute governing credit service organizations. In general, the respondents alleged that they and other West Virginia class members were improperly led to believe that their tax preparer was acting in a fiduciary relationship with them when offering the RALs on behalf of the bank and were unaware that petitioners received monetary compensation from the bank. The respondents also alleged that the structure of the RAL program is itself unsound under state law.

Respondents all executed RAL Applications containing an Arbitration Provision when applying for their RALs. Although the exact language of each Provision varies from year to year, the material provisions of each Agreement are substantially the same. For example, in 2002, respondents signed RAL applications containing an Arbitration Provision (reprinted in full at Pet. App. 16a-20a) in which they agreed that:

> any claim, dispute or controversy, whether in contract [or] tort (intentional or otherwise), whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with [petitioners] in any way relating to (a) the [loan] [d]ocuments or a similar documents [sic] for prior years, (b) advertisement, promotions, or oral or written statements related to RALs and/or (c) the relationships of the parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof . . . shall be resolved, upon the election of either [party], by

> binding arbitration pursuant to this Arbitration Provision. . . .

Pet. App. 16a-17a.

The Arbitration Provision also included a few other provisions of note. First, the bank and petitioners are barred from invoking their right to arbitrate any claim filed solely in a small claims court or equivalent court, a limitation that does not apply to the customer, who retains the right to elect arbitration of any claims. Pet. App. 17a. Second, the Provision clarified that "[n]othing in this Arbitration Provision shall be construed to prevent" the lending bank from offsetting the customer's tax refund against any amount owed on prior RALs or other bank debts, Pet. App. 18a, – a process done automatically and requiring no judicial or arbitral forum.

Third, the Provision stated that "[n]o class actions or joinder or consolidation of claims with other persons, are permitted without the consent of the parties hereto." Pet. App. 17a. Subsections C and D specifically address the limitation on seeking relief through a class action if arbitration is invoked. Subsection C provides in part:

> I ACKNOWLEDGE THAT I WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION, EVEN IF SUCH CLASS ACTION IS PENDING ON THE EFFECTIVE DATE OF THE ARBITRATION PROVISION, EXCEPT THAT THIS ARBITRATION PROVISION WILL NOT PRECLUDE MY PARTICIPATING IN A CLASS WHICH HAS ALREADY BEEN CERTIFIED ON THE EFFECTIVE DATE OF THIS ARBITRATION PROVISION.

Pet. App. 18a-19a (capitalization in original). Subsection D contains an additional disclaimer that the customer acknowledges that he or she "may be giving up [his or her] right to participate as a member of such class [challenging the RAL program but not yet certified]." Pet. App. 19a.

2. On December 5, 2003, petitioners moved to dismiss the First Amended Complaint and compel arbitration pursuant to the FAA. Respondents argued that the Arbitration Provision was unconscionable as a matter of West Virginia law and that the state court should decide that issue for itself. Petitioners responded, in turn, that the Provision was indeed enforceable pursuant to the FAA, which preempts any state law to the contrary, and also that the arbitrator should actually decide the question of unconscionability, because the Arbitration Provision encompassed disputes related to the "validity [and] enforceability" of the Provision.

The court denied the motion to compel arbitration orally at a hearing on March 18, 2004, and a written order was filed on June 1, 2004. In its order, the court first summarily rejected petitioners' argument that under the Arbitration Provision, an arbitrator, rather than the court, should decide whether the Provision was unconscionable, stating simply that "[t]he issue of whether a contract or provision is unconscionable 'is an equitable principle and . . . should be made by the Court.'" Pet. App. 7a-8a. The court cited one case, *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749 (W. Va. 1986), which dealt with whether unconscionability should be decided by a judge or a jury. The court then held that the Arbitration Provision was unconscionable based on two findings. First, the court found that the contractual offset rights were one-sided and (contrary to the plain language of the Provision) that petitioners could somehow pursue these offset remedies in court, and therefore that the Provision

contained non-mutual provisions allowing one party greater access to the courts than the other. Pet. App. 7a, 11a-12a. The court reasoned that this made the Provision unconscionable under the West Virginia Supreme Court of Appeals decision in *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998).

Second, the court found that the terms in the Provision limiting class action relief were unconscionable under the West Virginia Supreme Court of Appeals decision in *Dunlap* because petitioners could effectively prevent recourse to a class action by invoking arbitration. The court found that "the arbitration provisions contained in the RAL applications allow the Defendants to force potential plaintiffs into arbitration, unless the plaintiffs bring their claims in small claims court," Pet. App. 6a-7a, and that "[t]he effect of [the Provision] is that the Defendants are not subject to a class action suit unless they so desire." Pet. App. 7a. Reasoning that "as with many class action claims, the Defendants' ability to force arbitration effectively results in the inability of many plaintiffs to pursue their claims due to costs," the court concluded that "[h]inging the plaintiff's rights to class action relief upon the Defendants' preferences is contrary to the intent of assuring West Virginia customers the class action relief." Pet. App. 12a-13a. Thus, the court found the Provision unconscionable and refused to enforce it. Finally, the court denied a request to sever the unconscionable portions of the arbitration agreement and enforce the rest. Pet App. 14a.

Petitioners filed a timely petition for a writ of prohibition in the West Virginia Supreme Court of Appeals, arguing that the trial court's holding was flawed as a matter of law under state law and the FAA.[1] Respondents opposed the petition,

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[1] There is no requirement in West Virginia that the Supreme Court of Appeals hear interlocutory appeals from denials of motions to compel

relying heavily on the Supreme Court of Appeals' holding in *Dunlap* that arbitration provisions limiting class action relief are unconscionable. On September 2, 2004, the Supreme Court of Appeals denied the petition for a writ of prohibition, thus exhausting petitioners' potential remedies in state court.[2] Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This case raises important and recurring issues relating to the duty of all state and federal courts to enforce agreements to arbitrate disputes, particularly disputes involving claims that might be brought as a class action if filed in court. First, it is time for the Court to decide whether language in an arbitration agreement specifying that disputes must be litigated individually rather than on a class basis can provide a justification, consistent with the FAA, for a refusal to enforce the arbitration agreement itself. Over a decade ago, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court strongly suggested that parties entering into an arbitration agreement may validly agree that their disputes in arbitration will not be heard on a class basis, reasoning that

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arbitration, and instead the court chooses to evaluate such rulings on a discretionary basis pursuant to writs of prohibition. The Supreme Court of Appeals has held that § 16 of the FAA, which does provide for such appeals in federal court, does not preempt West Virginia's appellate procedure and thus does not require mandatory appellate jurisdiction in state courts of orders denying arbitration. *See Dunlap*, 567 S.E.2d at 271.

[2] Subsequent to the trial court's order under review, respondents filed a Second Amended Complaint naming two additional Block entities. On the basis of the allegations against the new entities, petitioners and the new Block entities filed a notice of removal. The federal district court is currently considering whether to remand the case to state court, and thus the case may be in either state or federal court at the time that briefing on the Petition is complete. Nevertheless, the removal does not affect this Court's jurisdiction to review the final judgment of the state court under § 1257(a).

class actions are merely a procedural device that may be waived without justifying a refusal to enforce the arbitration agreement itself. But the West Virginia Circuit Court, following the rule in that State, held that the prohibition on seeking class action relief in the arbitration clause of a form contract rendered the arbitration clause unenforceable on grounds of unconscionability.

There is a huge split of authority from around the country about whether the FAA permits or preempts such a state law rule limiting the ability of contracting parties to agree to send their disputes to individual hearings in arbitration. And there are several reasons why this Court should resolve that inconsistency as soon as possible. To begin, it is highly doubtful that the FAA does allow a state to void all arbitration agreements in consumer contracts waiving class actions. After all, such a rule means that the policies of the FAA will be generally disregarded in the context of consumer contracts, because almost any complaint involving such contracts can be brought as a class action.

Moreover, the need for review on this question is especially compelling because the deck is stacked against defendants seeking to enforce arbitration clauses barring class actions. They can win in dozens of jurisdictions, requiring potential class action plaintiffs to arbitrate their individual claims, but eventually some plaintiff will appear in a jurisdiction with the opposite rule and the defendant will find itself facing a statewide or possibly a nationwide class action. Once that occurs, the arbitration agreements signed by all of the class members are rendered a nullity – a result that hardly seems consistent with the letter and spirit of the FAA.

The second important question presented here is whether a court, rather than arbitration, is the proper forum for deciding questions of enforceability, including substantive

unconscionability, especially when a clause in the arbitration agreement specifically provides that an arbitrator should decide questions of the validity and enforceability of the arbitration agreement. Although the West Virginia courts' rule regarding the unconscionability of class action waivers requires the Court's direct review to correct, it is not clear that questions of an arbitration agreement's enforceability should be decided by a court in the first instance going forward. In this case, the court's insistence that it – not the arbitrator – was the proper forum to hear an unconscionability challenge to the arbitration agreement was especially problematic. For one thing, it defied the express language of the arbitration agreement itself, which stated that the arbitrator should decide questions about the validity and enforceability of the agreement to arbitrate. The Court has repeatedly held that contractual parties may validly agree to arbitrate questions about whether a given dispute falls within the scope of an arbitration clause – *i.e.*, to "arbitrate arbitrability" – even though that issue would otherwise fall within the authority of the court. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). It has not said whether parties may also properly agree to arbitrate the validity and enforceability of an arbitration agreement that, on its face, applies to a given dispute. But there is every reason to think that such a rule should follow from the Court's precedents.

Indeed, although many courts do address questions of unconscionability and other public policy challenges to arbitration agreements before sending cases to arbitration, this Court's decisions in recent years are moving toward the conclusion that once a dispute is within the substantive scope of an arbitration agreement in a contract, all challenges to the enforcement of the agreement to arbitrate based on the procedures that are provided, the fees that are demanded, or

the remedies that are available in arbitration should be addressed first to the arbitrator. This case would provide a welcome opportunity to clarify that, under the FAA, such substantive enforceability challenges must be arbitrated, at least when the parties so specified as in this case, and possibly even when they did not.

I. THE WEST VIRGINIA CIRCUIT COURT ERRED IN HOLDING THAT ARBITRATION PROVISIONS LIMITING THE USE OF CLASS ACTIONS ARE UNCONSCIONABLE.

The Circuit Court's holding that a prohibition on class actions constituted independent grounds for refusing to enforce the Arbitration Provision merits this Court's review. Citing the prevailing rule in West Virginia established in *Dunlap*, the court held that any prohibition on class actions in an arbitration clause in a form contract is unconscionable. Such a rule is difficult to square with this Court's suggestion in *Gilmer* that waivers of procedural remedies like class actions in arbitration clauses should be respected under § 2 of the FAA. The rule, while accepted by some other courts outside West Virginia, also conflicts directly with decisions by many other courts. There is a clear need for resolution of these issues to establish uniform national standards, consistent with the FAA.

1. The case upon which the Circuit Court based its holding, *State ex rel. Dunlap v. Berger*, is flawed in its approach to arbitration of class actions, yet it typifies the reasoning employed by other courts that have held arbitration agreements prohibiting class actions to be unconscionable. In *Dunlap*, the Supreme Court of Appeals reasoned that a limitation on use of class actions worked to the detriment of consumers, who were deprived of a substantive right to relief. The court noted that "[c]lass action relief – including the remedies of damages, rescission, restitution, penalties,

and injunction – is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases." 567 S.E.2d at 278. Further, the court reasoned that class actions "'correct[] wrongs committed by large-scale enterprise upon individual consumers,'" *id.* (quoting *McFoy v. Amerigas, Inc.*, 295 S.E.2d 16, 24 (W. Va. 1982)), and that their effectiveness is heightened in cases where consumers have small claims which can be aggregated:

> [T]he total of $8.46 [at issue] is precisely the sort of small-dollar/high-volume (alleged) illegality that class action claims and remedies are effective at addressing. In many cases, the availability of class action relief is a *sine qua non* to permit the adequate vindication of consumer rights.

Id. Thus, in the case of a contract of adhesion, "a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." *Id.* at 278-79. Citing a line of prior cases, the *Dunlap* court identified and relied on a principle of West Virginia law that "exculpatory" provisions in form contracts are unconscionable and applied that rule to the class-action ban.

The Supreme Court of Appeals found the FAA to be inapplicable because the court was purporting to apply general contract principles, not principles discriminating against arbitration in particular. The court rejected the argument that the FAA prevented this application of the unconscionability doctrine. It explained that the FAA allows rejection of arbitration agreements based on grounds that state law would apply to any contract. *Id.* at 272 n.3 (citing 9 U.S.C. § 2 and *Doctors' Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). It also derived from this Court's prior

cases the principle that an arbitration agreement is enforceable under the FAA only when it permits parties "to fully and effectively vindicate their rights." *Id.*; *see id.* at 281 (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000)). In the *Dunlap* court's view, the only way to enable consumers with very small claims to vindicate their rights is to allow aggregation of those claims in a class action.

Reasoning similar to that in *Dunlap* has led other courts around the country to hold that arbitration provisions limiting class actions are unconscionable. In *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003), the Court of Appeals of California held such provisions to be substantively unconscionable because the court thought the class action procedure necessary to vindicate rights under the statute in general, if not the particular rights of the named plaintiff:

> It is the *manner* of arbitration, specifically, prohibiting class or representative actions, we take exception to here. The clause is not only harsh and unfair to [the defendant's] customers who might be owed a relatively small sum of money, but it also serves as a disincentive [to the defendant] to avoid the type of conduct that might lead to class action litigation in the first place. . . . [The defendant] has essentially granted itself a license to push the boundaries of good business practice to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies. . . . Therefore, the provision violates fundamental notions of fairness.

Id. The Ninth Circuit has followed the lead of California courts as well in refusing to enforce arbitration agreements that prohibit class actions. *See Ingle v. Circuit City Stores*,

Inc., 328 F.3d 1165, 1175-76 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1169 (2004).

This type of free-wheeling, policy-driven analysis animates other decisions finding bans on class actions to be unconscionable. *See Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) ("Class litigation provides the most economically feasible remedy for the kind of claim that has been asserted here. . . . By requiring arbitration of all claims, Powertel has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone."); *Leonard v. Terminix Int'l Co. L.P.*, 854 So. 2d 529, 539 (Ala. 2002) (provision unconscionable in part because it "foreclos[es] the [plaintiffs] from an attempt to seek practical redress through a class action and restrict[s] them to a disproportionately expensive individual arbitration"); *Luna v. Household Finance Corp.*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) (provision's "prohibition of class actions is likely to bar [class] actions involving practices applicable to all potential class members, but for which an individual customer has so little at stake that she is unlikely to pursue her claim"); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000).

By contrast, these arguments against class action waivers have been rejected by many other courts, which have held instead that class actions are simply procedural mechanisms that can waived by a valid arbitration agreement under the FAA. For example, the Court of Appeals of Texas, expressly rejecting the argument that enforcing arbitration provisions will "encourage[] [businesses] to engage in illegal conduct because they will not have to be concerned about class actions," replied that:

> This assumes that the right to proceed on a class-wide basis supersedes a contracting party's right to arbitrate under the FAA. However, the primary purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate and to ensure that private agreements to arbitrate are enforced according to their terms. . . . [T]here is no entitlement to proceed as a class action.

AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 199-200 (Tex. App. - Houston [14th Dist.] 2003, no writ).

Other courts are in accord. *See Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div. 2003) ("[G]iven the strong public policy favoring arbitration, . . . and the absence of a commensurate policy favoring class actions, we are in accord with authorities holding that a contractual proscription against class actions . . . is neither unconscionable nor violative of public policy . . . ."); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); *Gras v. Associates First Capital Corp.*, 786 A.2d 886, 892-93 (N.J. Super. Ct. App. Div. 2001).

In addition, several other courts evaluating whether arbitration provisions may waive class actions in cases brought under the federal Truth in Lending Act – a statute that specifically anticipates enforcement through class actions – have concluded that the FAA's pro-arbitration policy should prevail. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818-19 (11th Cir. 2001); *see also Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) (possibility of pursuing class action is a "procedural nicet[y]" which can be waived by agreement to arbitrate).

Finally, *this very arbitration provision* has repeatedly been upheld (often in unpublished decisions) against a challenge to its enforceability, including its prohibition on class actions. *See, e.g.*, *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903 (7th Cir. 2004) (rejecting broad challenge to enforceability of this RAL arbitration clause). As one district court in Illinois put it in granting a motion to compel arbitration, "[n]othing prevents the Plaintiffs from contracting away their right to a class action." *Zawikowski v. Beneficial Nat'l Bank*, No. 98-C-2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999).

2. There are good reasons to think the uniform pro-arbitration policy embodied in § 2 of the FAA preempts any West Virginia law refusing to enforce arbitration provisions that restrict recourse to class actions. This Court itself strongly suggested that arbitration provisions limiting class actions are generally enforceable under the pro-arbitration policy of the FAA in *Gilmer*. The Court there held that an arbitration provision requiring arbitration of claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* was enforceable. One challenge to the arbitration provision was that, as a procedural matter, arbitration did not allow for the maintenance of class actions. The Court rejected the challenge succinctly, quoting Judge Becker's observation that "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Gilmer*, 500 U.S. at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). In other words, the fact that a particular statute allows enforcement through a class action does not mean that the plaintiff may not waive that procedural device in choosing a forum in which to adjudicate disputes.

Regardless of whether the Court in *Gilmer* squarely held that arbitration provisions limiting class actions are always enforceable, the Court quite clearly held that a class action was a procedural device, not a substantive right, which could validly be waived even if the option was established specifically in the governing statute. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (in federal court, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

Further, *Dunlap* and the Circuit Court's decision in this case run afoul of this Court's established doctrine under the FAA in that they demonstrate a clear preference for a judicial procedural device at the deliberate expense of arbitration. Arbitration, of course, is just a forum, and parties should be free to choose arbitration, and concomitant procedural rules within arbitration, under the terms of the FAA. As the Seventh Circuit recognized in disposing of unconscionability arguments against an arbitration provision essentially the same as this one:

> Is enforcement of this clause unconscionable? How could it be? Arbitration is just a forum; people may choose freely which forum will resolve their dispute.

Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d at 905-06. Indeed, as the *Carbajal* court added, "people are free to opt for bargain-basement adjudication" and that remains true even if the choice includes a waiver of rights, because "no general doctrine of federal law prevents people from waiving statutory rights (whether substantive or procedural) in exchange for other things they value more, such as lower prices or reduced disputation." *Id.* at 906-07.

The policy preference for a certain procedure, whether or not couched in terms of "unconscionability," is simply a device to ensure preference of the judicial forum over the arbitral forum. This the FAA does not allow. *See Doctor's*

Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 615-16 (S.D. W. Va. 2004) (criticizing *Dunlap* as favoring judicial procedural rules at the expense of arbitration). Indeed, most West Virginia plaintiffs in consumer cases *can now simply plead a class action* to extract themselves from arbitration agreements that might limit class relief. This hardly vindicates the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As the Seventh Circuit put it, arguments that arbitration clauses are unenforceable based on the unavailability of class actions are "the sort of litany that the federal Arbitration Act is supposed to silence." *Metro East Center for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002), *cert. denied*, 537 U.S. 1090 (2002).

The Court should review the judgment of the Circuit Court to resolve this critical question.

II. THE WEST VIRGINIA CIRCUIT COURT ERRONEOUSLY USURPED THE ROLE OF THE ARBITRATOR BY DETERMINING THAT THE ARBITRATION AGREEMENT WAS UNCONSCIONABLE.

In addition to reviewing the propriety of the Circuit Court's decision on the class action question, the Court should grant review to determine whether a court or an arbitrator is the appropriate forum going forward for making determinations about unconscionability questions, an issue which is itself important, recurring, and unresolved by the Court. The Arbitration Provision here contains standard language providing that questions about the "validity [and] enforceability" of the Arbitration Provision itself must be resolved by the arbitrator. Yet in this case, the Circuit Court

bypassed this language, simply declared that the issue was one for the courts to decide, and usurped the arbitrator's role by deciding the enforceability issue itself. That approach is troubling because it simply negated a term of the arbitration agreement in favor of blanket judicial resolution of enforceability issues that should properly be decided by an arbitrator. While the Court has not definitively ruled on this issue, the clear trend of recent arbitration cases suggests that arbitrators, not courts, should consider substantive enforceability challenges, particularly when the arbitration clause so specifies and arguably even in cases without such explicit provisions.[3]

First, as already noted, the Court has held that a dispute about whether a given claim is covered under an arbitration agreement normally falls within the bailiwick of the court, *unless* the arbitration agreement clearly and unmistakably specifies otherwise. *See First Options*, 514 U.S. at 943-45; *AT&T Techs.*, 475 U.S. at 649. When the parties clearly agree to "arbitrate arbitrability," the question of the scope of the arbitration agreement should go to the arbitrator in the first instance. A provision clearly indicating that the parties

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[3] It is still necessary for the Court to review the Circuit Court's holding on class actions before reaching the question whether remaining enforceability issues should be sent to the court or arbitrator for resolution. If the Court were to remand to arbitration without deciding the class action question, the arbitrator would still be duty-bound to apply West Virginia's flawed holding in *Dunlap* that prohibitions on class actions in arbitration agreements are unconscionable, notwithstanding the mandates of the FAA. Thus, the correctness of the *Dunlap* holding is an integral issue in resolving this case in *any* forum. Indeed, a remand to the arbitrator without reviewing *Dunlap* would simply freeze the law in this area, essentially making *Dunlap* unreviewable by removing any arguments against the merits of the decision from the judicial process. In this regard, the Court should resolve this case much the same as in *Randolph*, where the Court overturned the lower court's legal holding regarding enforceability and then remanded to compel arbitration.

should arbitrate "enforceability," to the extent that it includes substantive rather than procedural challenges to enforceability, is really no different.[4] Agreeing to arbitrate enforceability is no different than agreeing to arbitrate the merits of a dispute in that arbitration is "simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943.

Further, the Court has increasingly moved in the direction of holding that disputes about whether aspects of the arbitration provision should be enforced should be raised to the arbitrator in the first instance. For example, the Court has held that complaints about the adequacy of the relief that the arbitrator might award should not be raised in advance, at least if there is some uncertainty about the arbitration language or relief available. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). As the Court emphasized in *PacifiCare*, in a challenge that an arbitration clause was not enforceable due to possible limits on treble damages as remedies, the proper course is to

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[4] There is a good argument that challenges relating to whether the arbitration clause was validly agreed to ought to be considered by the court. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraudulent inducement of entire contract must be arbitrated, although court could properly consider claim that arbitration clause specifically was fraudulently induced). Therefore, a distinction should be drawn between challenges based on the substantive unconscionability of an arbitration clause (as here) and those involving what is sometimes called "procedural unconscionability" – arguments that the consumer never had meaningful notice of the arbitration agreement.

compel arbitration and let the arbitrator sort out the issues relating to enforceability. 538 U.S. at 407.[5]

The Court has also narrowed in other ways those categories of disputes about arbitration provisions that are considered appropriate for courts to resolve in advance. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Court rebuffed an effort to enlarge the role of courts in addressing "arbitrability" to include a determination about whether a claim was timely filed. It drew a distinction between the question whether a given dispute falls within an arbitration agreement and other procedural issues like timeliness and waiver that go first to the arbitrator. *Id.* at 84-85. And in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court held that a dispute over whether the unclear language of an arbitration agreement allowed *class* arbitration should be resolved by the arbitrator, not a court. It reasoned that the issue involved what *kind* of arbitration the parties had agreed to, not the narrow issue of whether a particular dispute is or is not arbitrable, which is presumptively for courts to decide.

This case presents the logical next question: who decides whether enforcement of the arbitration agreement would be unconscionable or violate public policy? There are different possible answers to this question. Some courts, building on

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[5] In *Green Tree Financial Corp.-Alabama v. Randolph*, the Court itself overturned a legally flawed lower court ruling that refused to enforce an arbitration agreement based on excessive costs. While review of the erroneous legal holding was necessary to resolve the case, the parties did not address whether, in the future, such disputes about excessive costs may be directed to the arbitrator in the first instance. Given that concerns about the arbitrator's treatment of fees and costs are just as speculative as the concerns about adequate relief identified in *PacifiCare*, it would be a logical next step to send those disputes to an arbitrator to resolve as well, though it was not necessary to decide this issue in *Randolph*, nor was it presented.

the line of cases just summarized, hold that once a given claim is determined to be covered by an arbitration agreement, all arguments about unconscionability or public policy arising from concerns about costs or the inadequacy of relief available in arbitration must be directed first to the decisionmaker specified by the parties – the arbitrator. *See Carbajal*, 372 F.3d at 906 (rejecting effort to avoid arbitration based on absence of potential for statutory fee award; "the arbitrator rather than the court determines the validity of these ancillary provisions") (citing *PacifiCare*); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726-27 (8th Cir. 2003) (unconscionability challenge to arbitration provision providing that prevailing party would recover costs and expenses "was properly presented to the arbitrator and not the District Court"), *cert. denied*, 124 S. Ct. 1147 (2004); *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258-62 (11th Cir. 2003) (arbitrator, not court, should decide whether "loser pays" provision in Title VII case undermines statutory remedy); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 92 (1st Cir. 2002) (argument that "loser pays" provision deprived party of statutory right and conflicted with statute's remedial goals must be presented to arbitrator); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 232 (3d Cir. 1997) (argument against arbitration premised on plaintiff's prospective inability to collect statutory punitive damages "is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide").

Others reject this position and address for themselves arguments regarding the enforceability of a provision challenged as unconscionable or against public policy. *See Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316 (5th Cir. 2002) (noting that "circuit courts are split on whether the enforceability of an arbitration clause

should be adjudicated before arbitration when a party contends that public policy prevents the clause's waiver of certain remedies" and concluding that the court should decide); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (holding that fee-splitting and remedy limitation provisions made arbitration agreement substantively unconscionable); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994) (holding that limitation of remedy provisions rendered arbitration clause unenforceable).

Then there is the third and least plausible position, reflected in the ruling of the Circuit Court in this case, that unconscionability is always a matter for the court to decide *even if the parties have specified otherwise in the contract.* A rule that challenges to the enforceability and validity of an arbitration agreement can never be validly assigned by agreement to the arbitrator makes little sense in light of the holding in *First Options* that parties *can* validly agree to arbitrate disputes over the scope of the arbitration agreement.

There is good reason to be concerned about courts running roughshod over such provisions. In this case itself, the court piled onto its class action holding and blatantly misconstrued a section of the Arbitration Provision dealing with contractual offset rights in order to find the Arbitration Provision unconscionable. The clause in question preserves a common self-help remedy, the right of the lending bank to offset a customer's overdue amounts owing on prior RALs or other bank debts against payout on a pending RAL. This is a process requiring no judicial action that makes perfect sense when a customer has asked for a "refund anticipation loan." The Circuit Court misconstrued this clause and a clause outside the arbitration agreement relating to payment of court costs to hold erroneously that petitioners had preserved some judicial options for themselves while denying them to its

customers, which it found unconscionable under West Virginia law.[6] While this holding is clearly in error, what is more disconcerting is that the Circuit Court casually cast aside the section of the Arbitration Provision providing that such questions regarding "validity [and] enforceability" are to be sent to the arbitrator. Regardless of the merits, there is simply no reason why the court, not the arbitrator, should be interpreting the contract in order to make this enforceability determination.[7]

The Court should take this opportunity to make clear that the West Virginia courts have gone too far by maintaining monopoly power to address unconscionability challenges even if the contract provides otherwise. Potential defendants, after all, have good reason to think that it is more sensible for these kinds of concerns to be addressed in arbitration in the first instance. In most if not all cases, the fairness arguments that underlie substantive unconscionability arguments are

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[6] The offset provision, of course, does not involve recourse to either a court or arbitrator at all. And the Arbitration Provision explicitly provides that *either party* can invoke arbitration as to *any* dispute, except one filed in small claims court by the customer (which "favors" the customer, not H&R Block). The clause outside the Arbitration Provision, stating that the customer is liable for attorneys' fees and court costs incurred to collect delinquent debts or unpaid fees, gives H&R Block no independent basis for filing a court action that could not be removed to arbitration at the discretion of the customer – which the customer would clearly be able to do under the plain language of the Arbitration Provision.

[7] The Court could properly vacate the Circuit Court's interpretation of the contract holding the offset provision to be unconscionable, as the arbitrator should be allowed to make this contract-specific determination in the first instance. The resolution of this issue is no different than the disposition in *Bazzle*, where the Court left it to the arbitrator in the first instance to interpret disputed contract language, notwithstanding the state court ruling interpreting the same language.

somewhat speculative, and the arbitrator, if presented with the arguments, might decide to solve the problem – whether it be excessive fees or a limitation on damages or even a waiver of class actions – while keeping the case in arbitration. Or, as it should in this case, the arbitrator might decide that there is no enforceability problem at all. But as long as courts are free to breeze by clauses assigning disputes over enforceability to an arbitrator in order to address these kinds of fairness arguments themselves, they will have a potent weapon and a proven inclination to avoid their duty under the FAA to enforce agreements to arbitrate such disputes. This case provides an excellent illustration of that problem, and the Court should grant review to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1, 2004

APPENDICES

APPENDIX A

STATE OF WEST VIRIGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of September, 2004, the following order was made and entered:

State of West Virginia ex rel. H&R Block, Inc.; H&R Block Tax Services, Inc.; H&R Block Eastern Tax Services, Inc.; Melanie Lester; Jason Brown; Bobby Hague; Robert Heckert; Cynthia Lantz; Clarence E. Miller; Carla R. Lewis; Debra Riggleman; and John Doe, Petitioners

vs.) No 041119

The Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County; Deadra R. Cummins, on her own behalf and on behalf of those similarly situated; and Ivan and LaDonna Bell, on their own behalf and on behalf of those similarly situated, Respondents

On a former day, to-wit, June 22, 2004, came the petitioners, H&R Block, Inc, et al., by Ancil G. Ramsey and Hannah B. Curry, Steptoe & Johnson, PLLC; and N. Louise Ellingsworth and Michael D. Pospisil, Bryan Cave LLP, their attorneys, and presented to the Court their petition praying for a writ of prohibition to be directed against the respondents, Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County, Deadra R. Cummins, and Ivan and LaDonna Bell, as therein set forth. Thereafter, on the 29th day of July, 2004, pursuant to a request for a response under Rule 14(b) of the Rules of Appellate Procedure, came

the respondents, Deadra Cummins and Ivan and LaDonna Bell, by Brian A. Glasser, H.F. Salsbery, Eric B. Snyder and Deidre H. Purdy, Bailey & Glasser, LLP, their attorneys, and presented to the Court their initial response thereto.

Upon consideration whereof, the Court is of the opinion that a rule should not issue. It is hereby ordered that the petition for writ of prohibition prayed for by the petitioners is hereby refused.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

DEADRA D. CUMMINS, on her own behalf and on behalf of those similarly situated, and IVAN and LaDONNA BELL, on their own behalf and on behalf of those similarly situated, Plaintiffs,

v.

H&R BLOCK, INC., H&R BLOCK TAX SERVICES, INC., H&R BLOCK EASTERN TAX SERVICES, INC., MELANIE LESTER, JASON BROWN, BOBBY HAGUE, ROBERT HECKERT, CYNTHIA LANTZ, CLARENCE E. MILLER, CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE, Defendants,

Civil Action No. 03-C-134
(Judge Louis H. Bloom)

ORDER DENYING SERVED DEFENDANTS' MOTION TO COMPEL ARBITRATION, ORAL MOTION TO SEVER ARBITRATION PROVISION, AND ORAL MOTION TO STAY PROCEEDINGS PENDING APPEAL

On the 18th day of March 2004, pursuant to notice, the parties appeared, by counsel, for the continuation of the December 11, 2003 hearing on "The Served Defendants' Motion to Dismiss and to Compel Arbitration" (hereinafter "Defendants' Motion"). At the March 18th hearing, the defendants' counsel also orally moved to sever the arbitration provision, and defendants' counsel also moved for a stay pending an appeal of this Court's ruling on these issues.

The Court considered the Defendants' Motion seeking to compel. arbitration based on the arbitration provision

contained in the Refund Anticipation Loan (hereinafter "RAL") application documents. After reviewing the various pleadings, exhibits, pertinent case law, and arguments of counsel made on December 11, 2003 and March 18, 2004, the Court denies Defendants' Motion to compel arbitration, denies the defendants' subsequent oral motion to sever the arbitration provision, and denies the defendants' oral motion for a stay pending appeal of this Court's ruling on the above-mentioned issues. These rulings are based on the following:

FINDINGS OF FACT

1. Defendants H & R Block, Inc, H & R Block Tax Services, Inc., H & R Block Eastern Tax Services, Inc., Robert Heckert, Cynthia Lantz, Clarence E. Miller, Carla R. Lewis, and Debra Riggleman (hereinafter collectively referred to as "Defendants"), on a previous day, filed "The Served Defendants' Motion to Dismiss and to Compel Arbitration."

2. Defendants' Motion asks this Court to dismiss this action and compel arbitration according to the arbitration provisions contained in RAL applications, which were signed by the Plaintiffs. The Defendants claim that the arbitration provision is governed by the Federal Arbitration Act. 9 U.S.C. § 1, et seq.

3. The Plaintiffs thereafter filed "Plaintiffs' Response to Defendants' Motion to Dismiss" on October 14, 2003, which asks this Court to find that the arbitration provisions contained in the RAL documents are unenforceable because certain provisions are unconscionable under West Virginia law.

4. The Plaintiffs claim that certain provisions of the arbitration agreement severely restrict the Plaintiffs' access to a judicial forum, but have absolutely no effect on the Defendants' rights. Plaintiffs claim that the Supreme Court

of Appeals of West Virginia held that provisions similar to the ones at hand were unenforceable as unconscionable. *See State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567. S.E.2d 265 (W. Va. 2002); *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (W. Va. 1998).

5. The RAL Applications from 1996 forward, but within the putative class period, contained language substantially similar to that contained in the RAL documents for the Plaintiffs in 2002, a copy of which was submitted at this hearing, and which contained the following language:

> "HB hereby agrees not to invoke its right to arbitrate an individual claim I may bring in small claims court or an equivalent court, if any, so long as the claim is pending only in that court. No class actions or joinder or consolidation of claims with other persons, are permitted without consent of the parties hereto".
>
> * * *
>
> "Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owed by me to HB or any other RAL Lender or ERO or third party pursuant to the Documents or similar prior documents"; and
>
> "Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which might

ultimately be paid to or conferred upon members of the class".

6. The Plaintiffs also contend that the arbitration provisions constitute adhesion contracts which contain unconscionable terms, thus making the provisions unenforceable.

7. The Plaintiffs' underlying complaint contains, among others, a claim asserted under the West Virginia Consumer Credit and Protection Act (hereinafter "WVCCPA") found in West Virginia Code, section 46A-6C-l et seq. The Plaintiffs contend that the arbitration provisions violate the WVCCPA and specifically that the Defendant's, by presenting the RAL application to the plaintiffs, caused consumers and buyers of services to waive certain rights in violation of West Virginia Code, section 46A-6C-8. Plaintiffs argue that because the arbitration provisions result in the Plaintiffs waiving certain rights, the provisions are void under the same statute.

8. The Defendants claim that they are not a "credit service organization" as they did not obtain an extension of credit but only transmitted the Plaintiffs' RAL application to the lending institutions. Therefore, the Defendants claim that they are not subject to the WVCCPA.

9. The Plaintiffs counter by alleging that because the Defendants negotiated and arranged the RAL's, it acted as a broker, and thus is subject to the WVCCPA.

10. It is clear from the facts that the Defendants were responsible for presenting the RAL application to the Plaintiffs and then transferring that application to the lending institution.

11. Based on the evidence presented, this Court finds as fact that the arbitration provisions contained in the RAL applications allow the Defendants to force potential plaintiffs

into arbitration, unless the plaintiffs bring their claims in small claims court.

12. This Court additionally finds as fact that the arbitration provisions preclude any plaintiff from pursuing any class action claims he or she may have against the Defendants, or joining any other plaintiff in claims against the Defendants. If the situation arose whereby the Defendants desired that plaintiffs' claims be joined, the Defendants could allow such joinder, if neither party forced arbitration. The effect of this is that the Defendants are not subject to a class action suit unless they so desire.

13. Furthermore, this Court finds as fact that the arbitration provisions do not prevent the Defendants from pursuing certain claims against plaintiffs, even if plaintiffs desire to have such claims subject to arbitration. Specifically, the Defendants can seek a judicial forum, over plaintiffs' objections, for matters relating to collection or, other contractual rights involving payment of the plaintiffs' tax refunds or other amounts on deposit with the Defendants. However, if plaintiffs wanted to pursue similar actions, the Defendants have the ability, under the arbitration provisions, to force the plaintiffs into arbitration.

14. The arbitration provisions at issue in this case state that "[e]ach party shall bear the expense of their respective attorney's fees, regardless of which party prevails" and if the Defendants pursue claims relating to collection or other contractual rights, the plaintiffs are responsible for the attorney's fees, collection agency fees, and court costs incurred by the Defendants in pursuing such actions.

DISCUSSION OF THE LAW

1. In resolving this motion, this Court must apply general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration. The

issue of whether a contract or provision is unconscionable "is an equitable principle and. . . should be made by the Court." Syllabus pt. 1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 346 S.E. 2d 749 (1986).

Federal Arbitration Act implications

2. The Federal Arbitration Act (hereinafter "FAA") establishes a national policy which favors arbitration, however, the FAA provides that contracts to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract". 9 U.S.C.A. § 2.

3. The Supreme Court of Appeals of West Virginia (hereinafter "WVSCA") held that the Federal Arbitration Act allows "pre-dispute agreements to use arbitration as an alternative to litigation in court . . . only when arbitration . . . [allows] a party to fully and effectively vindicate their rights." *State ex rel. Dunlap v. Berger*, 211 W. Va. 556, n.3, 567 S.E.2d at 273 n.3.

4. The WVSCA also cited a United States Supreme Court decision in stating that the existence of a large arbitration cost can preclude a litigant from vindicating rights. *Id* at 565, 567 S.E. 2d at 281, citing *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373, 383 (2000).

West Virginia Consumer Credit and Protection Act

5. The WVCCPA describes a credit services organization as:

> "a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide any of the following services: (1) Improving a buyer's credit

record, history or rating; (2) Obtaining an extension of credit for a buyer; or (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection."

W. Va. Code, § 46A-6C-2(a).

6. Under the West Virginia Consumer Credit and Protection Act, credit services organizations are prohibited from causing a buyer to waive a right under Article 46A of the West Virginia Code, and such waiver by a buyer is void. W. Va. Code § 46A-6C-8.

7. The WVCCPA states that: "With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan" a Court can refuse to enforce an agreement or parts of an agreement which the Court finds, as a matter of law, are unconscionable. W. Va. Code, § 46A-2-121.

Unconscionable Provisions

8. The WVSCA previously decided a case in which a lending company's loan agreement contained provisions requiring arbitration, but other provisions retained for the loan company the right to a judicial forum for purposes of collection and foreclosure proceedings. *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229 511 S.E.2d 854, (W. Va. 1998). The Court noted that the WVCCPA was specifically designed to eradicate these unconscionable provisions. *Arnold*, 204 W. Va. at 234, 511 S.E.2d at 859.

9. The WVSCA found in *Arnold* that there was no evidence that the loan broker made any other loan option available to the consumer and that the relative positions of the parties were an unsophisticated, elderly consumer and a national corporate lender. *Id.* at 236, 511 S.E.2d at 861.

10. The WVSCA also held in *Arnold* that:

> "In real life we can envisage arbitration provisions being imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law."
>
> * * *
>
> "Where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable, and, therefore, void and unenforceable as a matter of law."

Id. at 236-37, 511 S.E 2d at 861-62 (W. Va. 1998).

11. The WVSCA addressed a similar issue in *State ex rel. Dunlap v.* Berger, where the Court found arbitration provisions limiting punitive damages and class action relief to be unconscionable in the context of an insurance agreement. *Dunlap*, 211 W. Va. 549, 567 S.E.2d 265 (W. Va. 2002).

12. The WVSCA in *Dunlap* also found that the provisions limiting punitive damages and class action relief were unconscionable provisions of a adhesion contract, which did not allow for the full exercise of the plaintiff's rights. *Dunlap*, 211 W. Va. at 567, 567 S.E.2d at 283.

13. In finding that the contract in *Dunlap* was an adhesion contract the WVSCA noted various definitions of such. contracts, which included "all form contracts submitted by one party on the basis of this or noting. *Id.* at 557, 567 S.E.2d at 273.

14. The contract at issue in Dunlap was pre-printed form. Id. at 554, 567 S.E.2d at 270.

15. The Dunlap Court held that:

> "Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. Syllabus pt. 2, *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E 2d 265 (W. Va. 2002).

16. The parties in *Dunlap* stipulated that the consumer could not obtain punitive damages or class action relief in an arbitration proceeding. *Id.* at 563, 567 S.E.2d at 271. The *Dunlap* Court found that the $8.46 insurance charge that the consumer was challenging was the type of claim that class action claims and remedies are effective at addressing and that "[c]lass actions are essential to the enforcement and effective vindication of the public purposes and protections of the underlying [consumer protection] law." *Dunlap*, 211 W. Va. at 564, 567 S.E. 2d at 279.

CONCLUSIONS OF LAW

1. The arbitration provisions contained in RAL Documents, as cited above, are one-sided provisions of non-mutuality. The provisions preserve, almost exclusively for the Defendants, the rights of offset, self-help, and a judicial forum.

2. This non-mutuality is unconscionable under the plain language of the *Arnold* decision.

3. This Court finds that the arbitration provisions at issue are exculpatory and would unconscionably impair rights that are afforded under West Virginia law, which was designed to protect the public from these types of provisions.

4. The fact that the provisions preclude plaintiffs ability to participate in a class action unless the defendants decide to not force arbitration results in a situation, similar to that in Dunlap, where consumers are not able to effectively pursue their state law rights.

5. The only situation in which the plaintiffs could benefit from a class action suit is where the defendants would agree to not force arbitration. Of course, the defendants would not likely allow class action claims unless it was to their benefit.

6. At the hearing on the Defendants' Motion, counsel admitted that H & R Block voluntarily joined a class action from which it had already been dismissed on a motion to compel arbitration.

7. Although the Defendants claim that the plaintiffs have the same right as the defendants, to avoid class action by forcing arbitration, this equality is transparent. It is true that both parties may have an economic incentive to allow claims to be certified under a class action suit. However, as with many class action claims, the Defendants' ability to force arbitration effectively results in an inability of many plaintiffs to pursue their claims due to costs.

8. If forced into arbitration the plaintiffs, under the arbitration provisions, would then be responsible for their own attorney fees, and attorneys do not have the added incentive of taking their case based on the potential attorney fee award: Hinging the plaintiffs' right to class action relief upon the Defendants' preferences is contrary to the intent of assuring West Virginia consumers the class action relief.

9. This type of restriction on the rights of West Virginia consumers is substantially limiting to state law rights, and such provisions, in the context of this case, are therefore unconscionable under West Virginia law.

10. Block has offered no serious evidence or argument to suggest that this clause would not effectively act as an exculpatory clause, nor have they drawn this Court's attention to any exceptional circumstances that would suggest that the provisions are conscionable.

11. Realistically, it is clear from this record that the arbitration clause at issue would not permit consumers, such as the plaintiffs, to effectively vindicate their legal rights with claims of this sort.

12. While a finding that the provisions are unconscionable is enough to defeat Defendants' Motion, the Plaintiffs also allege that the arbitration provisions constitute adhesion contracts. Based on the scant representations and evidence presented, the arbitration provisions may well constitute an adhesion contract, but this Court need not reach that issue at this point. Further discovery may reveal more conclusively whether this agreement was an adhesion contract.

13. For these reasons, this Court finds that at least two provisions of the Arbitration Provision contained in the RAL documents are unconscionable and violative of West Virginia state law. These provisions are unenforceable as defined by the Supreme Court of Appeals of West Virginia. *See State ex. rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (W. Va. 2002); *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (W. Va. 1998). West Virginia law, as articulated in these two cases, provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created between defendants and plaintiffs.

1. For the reasons set forth above, the agreement to arbitrate is unconscionable and is not entitled to enforcement. Accordingly, the Served Defendants' Motion to Compel Arbitration is **DENIED**.

2. The Court next considered defendants' oral motion to sever the portions of the arbitration provisions deemed to be unconscionable and to enforce the remaining provisions. This Court finds that the parts of the arbitration provisions that are unconscionable are fundamental to the arbitration provisions as a whole and therefore, this Court finds that the entire arbitration provision is unenforceable and void. Defendants' oral motion to sever the arbitration provision is therefore **DENIED**.

3. The Court next considered the Defendants' oral motion to stay all proceedings pending appeal of this Court's ruling as to arbitration. After hearing the arguments of counsel, the Defendants' Motion to Stay is **DENIED**.

4. The objection of any party to the entry of this order is hereby noted and preserved.

5. The Clerk is **DIRECTED** to send certified copies of this Order to all counsel of record, which shall include Brian A. Glasser, Michael B. Victorson, and Michael D. Pospisil and N. Louise Ellingsworth. Copies of this Order for Mr. Pospisil and Ms. Ellingsworth shall be sent to Bryan Cave LLP, One Kansas City Place, 1200 Main Street, Suite 2500, Kansas City, Missouri, 64105-2100.

ENTER this 1st day of June 2004.

/s/
Judge Louis H. Bloom

APPENDIX C

LOAN APPLICATION, AUTHORIZATION AND CERTIFICATION FOR A REFUND ANTICIPATION LOAN ("RAL")

A RAL Program Offered By Household Bank, f.s.b. ("HB") In Association With H&R Block ("ERO")

1. INFORMATION

Applicant's Name	Joint Applicant - Spouse (if joint return)
Deadra D. Cummins First Last	_____ First M.I/ Last
Social Security # 223-23-755	Social Security # _____-_____-_____
Date of Birth 02/14/65 See "NOTE" below	Date of Birth _____/_____/_____
Home Phone # (301) 340-5815 (Required)	Home Phone # (___)___-____ (Required, if different)
Work Phone # (304)354-7250 (Required, if employed)	Work Phone # (___)___-____ (Required, if employed)

* * * *

11. ARBITRATION PROVISION:

A. By signing this RAL application or the Loan Agreement (collectively the "Documents"), I hereby agree that any claim, dispute or controversy, whether in contract, tort (intentional or otherwise), whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with HB (as defined below) in any way relating to (a) the Documents or a similar documents for prior years, (b) advertisements, promotions, or oral or written statements related to RALs, and/or (c) the relationships of the

parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof (collectively the "Claim"), shall be resolved, upon the election of either me or HB, by binding arbitration pursuant to this Arbitration Provision and the applicable rules of either the American Arbitration Association ("AAA"), JAMS/Endispute ("JAMS") or the National Arbitration Forum ("NAF") in effect at the time the Claim is filed. The party initiating the arbitration proceeding shall have the right to select one of these three arbitration administrators. The arbitrator must be a lawyer with more than ten (10) years of experience or a retired or former judge. In the event of a conflict between this Arbitration Provision and the rules of the arbitration administrator, this Arbitration Provision shall govern.

B. HB hereby agrees not to invoke its right to arbitrate an individual Claim I may bring in small claims court or an equivalent court, if any, so long as the Claim is pending only in that court. No class actions or joinder or consolidation of claims with other persons, are permitted without the consent of the parties hereto. On any claim I file, I will pay the first $50.00 of the filing fee. At my request, HB will pay the remainder of the filing fee and any administrative or hearing fees charged by the arbitration administrator, up to $1,500.00 on any Claim asserted by me in the arbitration. If I should be required to pay any additional fees to the arbitration administrator, HB will consider a request by me to pay all or part of the additional fees; however, HB shall not be obligated to pay any additional fees unless the arbitrator grants me an award. If the arbitrator grants me an award in my favor, HB will reimburse me for any fees paid or owed by me to the arbitration administrator up to the amount of the fees that would have been

charged if the original Claim had been for the amount of the actual award in my favor. If the arbitrator issues an award in HB's favor, I will not be required to reimburse HB for any fees HB has previously paid to the arbitration administrator or which H&B is responsible. Any participatory arbitration hearing that I attend will take place in federal judicial district. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16 (the "FAA"). The arbitrator shall apply substantive law consistent with the FAA and the arbitrator's award shall not be subject to appeal, except as permitted by the FAA. Upon request of either party, the arbitrator shall prepare a short reasoned written opinion supporting the arbitration award. Judgment upon the award may be entered in any court having jurisdiction. Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owned by me to HB or any other RAL Lender or ERO or third party pursuant to the Documents or similar prior documents.

C. I ACKNOWLEDGE THAT I HAVE A RIGHT TO LITIGATE CLAIMS IN COURT BEFORE A JUDGE OR JURY, BUT I PREFER TO RESOLVE ANY SUCH CLAIMS THROUGH ARBITRATION AND HEREBY KNOWINGLY AND VOLUNTARILY WAIVE MY RIGHTS TO LITIGATE SUCH CLAIMS IN COURT BEFORE A JUDGE OR A JURY, UPON ELECTION OF ARBITRATION BY HB OR BY ME. I ACKNOWLEDGE THAT I WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS

PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION, EVEN IF SUCH CLASS ACTION IS PENDING ON THE EFFECTIVE DATE OF THIS ARBITRATION PROVISION, EXCEPT THAT THIS ARBITRATION PROVISION WILL NOT PRECLUDE MY PARTICIPATION IN A CLASS WHICH HAS ALREADY BEEN CERTIFIED ON THE EFFECTIVE DATE OF THIS ARBITRATION PROVISION.

D. I understand that one or more affiliates of HB are defendants in several class action lawsuits challenging various aspects of HB's RAL program. Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which might ultimately be paid to or conferred upon members of the class.

E. This Arbitration Provision shall supersede any prior Arbitration Provision contained in any previous RAL application or loan agreement and shall survive repayment of my RAL and termination of my account. If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of this Arbitration Provision.

F. As used in this Arbitration Provision, the term "HB" shall mean Household Bank, f.s.b., and H&B Block, Inc., and each of their parents, wholly or majority-owned subsidiaries, affiliates, predecessors, successors, and the franchisees of any of them, and each of their officers, directors, and employees.

G. Contacting Arbitration Administrators: If I have a question about the arbitration administrators mentioned in this Arbitration Provision or if I would like to obtain a copy of their arbitration rules, I can contact them as follows: American Arbitration Association, 335 Madison Avenue, New York, NY 10017, www.adr.org. Arbitration rules for the Resolution of Consumer-Related Disputes (applicable to requests for arbitration filed by a consumer involving a claim under $10,000), Commercial Arbitration Rules (for all other claims), JAMS, 45 Broadway, 28th Floor, New York, NY 10017, www.jamsadr.com, Financial Services Arbitration Rules and Procedures, National Arbitration Forum, P.O. Box 50191, Minneapolis, MN 55405, www.arb-forum.com, Code of Procedure.

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